Filed 12/23/13 P. v. Deville CA4/2

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

| | |
|---|---|
| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>JACOB GREGORY DEVILLE,<br>Defendant and Appellant. | E057286<br>(Super.Ct.No. RIF1104961)<br>OPINION |

APPEAL from the Superior Court of Riverside County. John Vineyard, Judge. Affirmed.

Theresa Osterman Stevenson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, and Barry Carlton and Seth M. Friedman, Deputy Attorneys General, for Plaintiff and Respondent.

## I. INTRODUCTION

Defendant Jacob Gregory Deville appeals from his conviction of corporal injury to a spouse with a prior (Pen. Code,[1] § 273.5, subds. (a), (e)(1), count 1); assault by means likely to cause great bodily injury (§ 245, subd. (a)(1), count 2); spousal rape (§ 262, subd. (a)(1), count 3); and misdemeanor resisting an officer (§ 148, subd. (a)(1), count 4).

Defendant contends: (1) the trial court abused its discretion by excluding evidence of the victim's mental health or, in the alternative, he was denied effective assistance of counsel; (2) the evidence was insufficient to support his conviction of spousal rape; (3) the trial court abused its discretion in denying his motion for a mistrial and in failing to replace a juror who had received communication from defendant's girlfriend; (4) the trial court abused its discretion in sentencing him to the middle term and to consecutive sentences; and (5) the trial court in failing to stay his sentence for the corporal injury offense under section 654.

We find no prejudicial error, and we affirm.

## II. FACTS AND PROCEDURAL BACKGROUND

Defendant and Y. Doe were married in 2010. About six months into their relationship, defendant began to get violent; before September 2011, he had physically abused Doe three times.

On Sunday, September 25, 2011, defendant, Doe, and defendant's friend Victor drank beer at defendant's house. Doe consumed three tall beers and she got drunk.

---

[1] All further statutory references are to the Penal Code unless otherwise indicated.

Defendant was acting in a manner consistent with his behavior on prior occasions when he had ingested methamphetamine. Defendant became angry because he thought Victor was trying to "dedicate" songs on the radio to Doe. Doe suggested that Victor should leave, and he did so.

Because defendant thought Doe had ended the party too soon, he grabbed her arms, pushed her into the kitchen, and held her against the wall with his forearm against the top of her chest and her neck. Doe could not breathe, and she begged defendant to stop. Instead, he hit her face with a closed fist more than three times, causing pain that ranked 10 on a scale of 1 to 10.

Defendant then moved Doe against a counter, facing toward cabinets. A lot of what happened was a blur to Doe because she was drunk. Defendant hugged her from the back in a way that indicated he wanted to have sex with her, and he started kissing and touching her. Doe did not want to have sex, and she kept telling defendant so. Defendant pulled Doe's jeans down and tried to get his penis erect. He repeatedly tried to enter her vagina and anus. Doe felt the tip of his penis penetrate her vagina, and she felt a stinging sensation in her anus. She "felt some kind of pain" and she then "blacked out."

When she woke up, she was lying on the kitchen floor and defendant was not there. She left the house, but then turned around because she had no phone or money. She was afraid to go back into the house, so she sat outside for about 20 minutes. When she went inside, she saw defendant passed out on the sofa. She became angry and called 911 and asked the police "to come and help [her] because [she] wanted to hurt [her]

husband." In the call, she did not say she had just been beaten and raped. She asked the police to meet her at her mother-in-law's house.

Doe started walking toward her mother-in-law's house, and on the way, she noticed she had urinated on herself. She saw police lights, but she hid in a ravine because she was scared. She eventually made contact with Deputy Sheriff Adam Ruis. She told him defendant had beaten her.

On cross-examination, Doe said she had drunk three tall cans of beer that night. She said she "g[o]t a little weird" when she was drunk, including burning herself with cigarettes. She first testified she had never told anyone about the earlier incidents of violence. After reading a transcript of an interview with a detective, she stated she had told law enforcement about the other incidents. She did not remember telling Deputy Ruis she had been raped, and reading the police report did not refresh her memory.

Deputy Ruis testified that he had been dispatched to an address in Menifee and was told to be on the lookout for Doe. He looked around the area and found Doe looking disheveled and "[k]ind of out of it." She was crying and "rambling," and she told him she needed to "get out of here," and she was going to hurt herself or her husband. She did not say anything about defendant beating her. Deputy Ruis believed she was under the influence of alcohol.

Deputy Ruis determined that Doe could be a danger to herself or others under Welfare and Institutions Code section 5150, and he put her in the back of his patrol car and drove her to the station so she could be transferred to an ambulance. When Doe was talking to the emergency personnel, Deputy Ruis learned it might be a domestic violence

situation. He then noticed that she had a large lump on her cheek, black eyes, a swollen lip and nose, a bump on the back of her head, and an injured toe. He asked Doe what had happened, and she said defendant had punched, choked, and raped her. She also complained of pain in her vagina.

Deputy Ruis and two other deputies went to defendant's house. Looking inside, they saw what appeared to be blood on the floor. Deputy Ruis was concerned that someone might be hurt, so he opened the door and shouted that police were present and anyone inside should make themselves known. No one responded. The deputies entered and found defendant sleeping in the bedroom. Defendant was covered with a blanket, and he did not respond to the deputies' command to show his hands. Deputy Ruis started to pull off the blanket, and defendant shouted, "[w]hat the fuck," and grabbed the deputy's baton. Defendant struggled with the deputies for 10 or 15 seconds before they were finally able to handcuff him.

Doe was transported to a hospital and was examined by a nurse on the hospital's sexual assault response team. The nurse observed the same external injuries as Deputy Ruis had seen. Doe complained of generalized body pain, genital burning, vaginal bleeding,[2] and tenderness at the entrance to her vagina. She said defendant had sexually assaulted her and had slapped, hit, and choked her. The nurse did not make any physical findings in or around Doe's vagina and anus; however 65 to 70 percent of sexual assault victims have no genital findings.

[2] The nurse determined Doe had started her period.

The jury found defendant guilty of corporal injury to a spouse with a prior (§ 273.5, subds. (a), (e)(1)); assault by means likely to cause great bodily injury (§ 245, subd. (a)(1)); spousal rape (§ 262, subd. (a)(1)) and misdemeanor resisting an officer (§ 148, subd. (a)(1)).

The trial court sentenced defendant to the middle term of six years for the spousal rape, a consecutive 16 months for the corporal injury, and a concurrent term of 180 days for resisting an officer. The court imposed a three-year term for the assault but stayed the sentence under section 654.

Additional facts are set forth in the discussion of the issues to which they pertain.

## III. DISCUSSION

### A. Exclusion of Evidence of Doe's Mental Health

Defendant contends the trial court abused its discretion by excluding evidence of Doe's mental health.

#### *1. Additional Background*

Defendant moved in limine for an order allowing his counsel to question Doe about her mental health, her medications, and suicide attempts. Defense counsel argued the evidence would come in through Doe's testimony, and such evidence was relevant to her credibility. Defense counsel made an offer of proof that he believed Doe had been diagnosed as bipolar and schizophrenic. The prosecutor stated that at one time, Doe had no longer wanted to prosecute, and she had told the defense investigator, "'Wow, some of this happened; but the bad stuff, that didn't happen because I'm bi-polar and schizophrenic and I must have been having an episode at the time.'" The trial court

denied the motion without prejudice, finding that the evidence had little probative value and would be extremely prejudicial without medical testimony about a diagnosis. The trial court stated that if defense counsel could establish a foundation for the evidence in appropriate medical testimony, the court would reconsider its ruling.

*2. Standard of Review*

We review the trial court's evidentiary rulings, including whether evidence is more prejudicial than probative, under the deferential abuse of discretion standard. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)

*3. Analysis*

Defendant argues that the exclusion of the evidence inhibited his constitutional right to confront and cross-examine the sole witness against him on the rape charge and therefore impeded his right to a fair trial. He argues the trial court erred in requiring the defense to establish a medical foundation when he sought to question Doe about her own knowledge of her medical conditions and medications and their effects on her ability to perceive and recall events.

"[T]he mental illness or emotional instability of a witness can be relevant on the issue of credibility, and a witness may be cross-examined on that subject, if such illness affects the witness's ability to perceive, recall or describe the events in question. [Citations.]" (*People v. Gurule* (2002) 28 Cal.4th 557, 591-592.) In *People v. Anderson* (2001) 25 Cal.4th 543, the court stated that mental illness, when relevant to credibility, "may be established by cross-examination concerning the witness's clinical history of diagnosis or treatment. [Citations.]" (*Id.* at p. 608.) The court continued, "'Factors a

court should consider in allowing such evidence are the nature of the psychological problem, the temporal recency or remoteness of the condition, and whether the witness suffered from the condition at the time of the events to which she is to testify.' [Citation.] For example, a mental illness that causes hallucinations or delusions is generally more probative of credibility than a condition causing only depression, irritability, impulsivity, or anxiety. [Citations.]" (*Id.* at pp. 608-609.) In that case, the court held the trial court did not abuse its discretion in excluding cross-examination of a prosecution witness on her clinical history of mental illness. The court explained that the defense offer of proof was only that her children had been taken away, she had been diagnosed as "'emotionally disturbed,'" she had taken prescribed medications, and she had received therapy for "'mental anguish.'" The court held that such evidence "did not demonstrate a condition likely to affect her ability to perceive or recall," and the defense had demonstrated the witness's mental illness through other testimony. (*Id.* at p. 609.)

Trial courts have "'wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits'" on cross-examination of witnesses "on matters reflecting on their credibility." (*People v. Quartermain* (1997) 16 Cal.4th 600, 623.) "A trial court's limitation on cross-examination pertaining to the credibility of a witness does not violate the confrontation clause unless a reasonable jury might have received a significantly different impression of the witness's credibility had the excluded cross-examination been permitted. [Citations.]" (*Id.* at pp. 623-624.) In that case, the court held that when ample evidence impeaching a prosecution witness's credibility had been introduced, the trial court's error in barring cross-examination of the witness regarding his bribery of two

judges in prior proceedings was not a constitutional violation. (*Id.* at p. 624.) (See also *People v. Gutierrez* (2009) 45 Cal.4th 789, 808 [trial court did not abuse its discretion by excluding cross-examination about a witness's communications with a prospective juror when other permitted cross-examination "amply demonstrated [the witness's] potential bias" against the defendant].)

Nonetheless, even if the trial court abused its discretion in excluding the evidence, we find the error harmless. Doe testified she had consumed three tall cans of beer in a short time and she had been drunk when the incident occurred. She testified that she got "a little weird" when she was drunk, and the incident had been a "blur." Specifically, during direct examination, the prosecutor asked Doe what had happened when she was pushed up against the counter, and she responded, "I can't really remember because I was drunk like I said." She continued, "So a lot of that is just a blur to me." She also said she could "remember some of the things, but [she was] not really sure." Deputy Ruis testified that Doe had initially told him she was not hurt, she had not told him immediately that defendant had beaten and raped her, and she admitted she had lied to the deputy. Because of her conduct and statements, he believed she met the standards for psychiatric evaluation under Welfare and Institutions Code section 5150. The medical examination revealed no physical findings of rape.

Thus, Doe's credibility was significantly impeached by the above-described evidence. It was not reasonably likely the jury would have received a substantially different impression of her credibility if the excluded cross-examination had been

permitted. We conclude defendant's confrontation clause rights were not violated. (*People v. Quartermain*, *supra*, 16 Cal.4th at pp. 623-624.)

**B. Assistance of Counsel**

Defendant argues, in the alternative to his previous argument, that he received ineffective assistance because his counsel failed to procure an expert to lay an appropriate foundation to cross-examine Doe about her mental health.

A defendant claiming ineffective assistance of counsel must establish both that his counsel's performance fell below an objective standard of reasonableness under prevailing professional standards and that a more favorable outcome was reasonably probable in the absence of counsel's deficient performance. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688.) In assessing counsel's performance, we indulge a strong presumption of the reasonableness of counsel's actions or inactions. On direct appeal, if the record is silent as to why counsel acted or failed to act in the manner challenged, we reject the assertion of deficient performance unless counsel was asked for an explanation and failed to provide one or unless there simply could be no satisfactory explanation. (*People v. Kelly* (1992) 1 Cal.4th 495, 520.)

Here, the silent record leaves it entirely possible that counsel did consult with a medical expert and determined that no favorable testimony would result if the expert was called as a witness. As the court stated in *People v. Bolin* (1998) 18 Cal.4th 297 at page 334, "The record does not establish defense experts would have provided exculpatory evidence if called, and we decline to speculate in that regard . . . ." Moreover, as discussed above, we have concluded that the limitation on cross-examination was not

prejudicial. We therefore reject defendant's argument that he received ineffective assistance of counsel.

**C. Sufficiency of Evidence**

Defendant contends the evidence was insufficient to support his conviction of spousal rape. He contends the evidence did not show his penis penetrated Doe's vagina.

*1. Additional Background*

During direct examination, Doe testified that defendant tried to get an erection and tried to enter either her vagina or anus. The prosecutor asked, "At some point, did his penis go in your vagina?" She responded, "I felt like a sting, kind of like a stinging sensation in my anal [*sic*]." The colloquy continued:

"Q. In your anus?

"A. In my anus and that is what I remember.

"Q. Do you remember his penis in your vagina?

"A. I just remember it—like the tip going in.

"Q. Into your vagina?

"A. In my vagina and the anus.

"Q. Okay.

"A. And that is all I remember.

"Q. So I want to be clear. Okay. Did any portion of his penis go into your vagina that you remember? You said the tip?

"A. The tip.

"Q. Did any portion of his penis—do you know if it actually went into your anus or no?

"A. Yes, because it stung."

*2. Standard of Review*

When a criminal defendant contends the evidence was insufficient to support his conviction, we review "'"the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt."' [Citations.]" (*People v. Burney* (2009) 47 Cal.4th 203, 253.)

*3. Analysis*

Defendant was convicted of a violation of section 262, subdivision (a)(1), which requires sexual intercourse against the victim's will. Sexual intercourse means any penetration, no matter how slight, of the victim's vagina or external genitalia by the defendant's penis. (*People v. Harrison* (1989) 48 Cal.3d 321, 329.) Defendant appears to argue that the evidence in fact showed that defendant had penetrated her anus, not her vagina. In *People v. Stitely* (2005) 35 Cal.4th 514, 554-555, the court stated that "'sexual intercourse' has a common meaning in the context of rape . . . and that the term can only refer to vaginal penetration or intercourse. [Citations.]" Thus, the court held, the defendant "could not have been convicted of nonconsensual sexual intercourse and rape based on anal penetration used to prove sodomy." (*Id.* at p. 555.) Nonetheless, Doe's testimony that the tip of defendant's penis entered her vagina was sufficient to sustain defendant's conviction. (See, e.g., *People v. Gammage* (1992) 2 Cal.4th 693, 700.) The

lack of corroborating physical evidence is immaterial. "[C]onviction of a sex crime may be sustained upon the uncorroborated testimony of the prosecutrix. [Citation.]" (*People v. Poggi* (1988) 45 Cal.3d 306, 326.)

**D. Denial of Motion for Mistrial and Failure to Replace Juror**

Defendant contends the trial court abused its discretion in denying his motion for a mistrial and in failing to replace a juror who had received communication from defendant's girlfriend.

*1. Additional Background*

After the jury's first day of deliberations, defense counsel informed the trial court that defendant's fiancée had reported that she had entered the bathroom with Juror No. 7 and had staged a phone call in which she stated that defendant was not the monster he had been painted to be.

The next morning, the trial court stated it would interview the jurors individually, beginning with Juror No. 7, about anything they had overheard outside the courtroom. The following colloquy took place with Juror No. 7:

"THE COURT: [Juror No. 7], we have asked you in here separately because I have received some information that indicates that you may have overheard a discussion about this case or the parties involved in this case outside the courtroom. Did you overhear any conversation to that effect?

"TJO7: No.

"THE COURT: The information I have is that the conversation was in the women's restroom here in the courthouse. Did you overhear a conversation in the restroom?

"TJO7. I didn't overhear a conversation. The lady over here she told me to keep an open mind. I said, 'I'm sorry.' I walked out.

[¶] . . . [¶]

"THE COURT: What exactly did she say to you?

"TJO7: That they make him seem worse than his is, to keep an open mind.

"THE COURT: What did you say in response?

"TJO7: I said, 'I'm sorry.' I walked out of the bathroom.

"THE COURT: She didn't say anything else to you?

"TJO7: No.

"THE COURT: Have you discussed that—let me back up. Is there anything about that conversation that you had that would impact your ability to be a fair judge of the facts in this case and to be a fair juror?

"TJO7: No.

"THE COURT: Do you think you can put aside that contact and participate in the jury and fairly deliberate and fairly reach a verdict?

"TJO7: Yes.

"THE COURT: Have you told anybody else about that contact or that communication?

"TJO7: No.

[¶] . . . [¶]

"THE COURT: Is there a reason that you didn't tell [the bailiff] about the contact?

"TJO7: I didn't think about it."

The trial court instructed Juror No. 7 not to talk about the matter with other jurors.

The prosecutor told the trial court he would like to have Juror No. 7 removed because she had talked with defendant's fiancée, but it would be improper to remove her in light of her answers to the court's questions. Defense counsel stated he believed it would be improper to leave Juror No. 7 on because she had not been forthcoming in responding to the trial court's first question about whether she had overheard a conversation. The trial court stated that its first question had been a "bad question," and Juror No. 7's answer was responsive and honest. The trial court found no basis to remove Juror No. 7.

Defense counsel moved for a mistrial or, in the alternative, for the removal of Juror No. 7. The trial court denied the motion. The trial court instructed the jurors to avoid communication with anyone regarding the case. They then resumed deliberations.

*2. Analysis*

A criminal defendant has a constitutional right to trial by unbiased, impartial jurors. (*People v. Nesler* (1997) 16 Cal.4th 561, 578 (*Nesler*).) A juror's inadvertent receipt of out-of-court information falls within the general category of juror misconduct. (*Id.* at p. 579.) Even though not blameworthy, such receipt of extraneous information gives rise to a presumption of prejudice because it creates the risk that jurors may be

influenced by material the defendant has had no opportunity to confront, cross-examine, or rebut. (*Ibid.*)

In reviewing a claim of juror misconduct, we accept the trial court's determination of credibility and its findings of historical fact to the extent they are supported by substantial evidence. (*Nesler*, *supra*, 16 Cal.4th at p. 582.) Whether prejudice arose from juror misconduct is a mixed question of law and fact that we review de novo. (*Ibid.*) We review the receipt of such information in light of the entire record, and we set aside the verdict only if there was a substantial likelihood of juror bias. (*In re Carpenter* (1995) 9 Cal.4th 634, 653 (*Carptenter*). A substantial likelihood of bias arises when either (1) the extraneous material, judged objectively, is so prejudicial that it inherently and substantially likely to have influenced a juror or (2) from the nature of the misconduct and surrounding circumstances, the court determines that it is substantially likely a juror was actually biased against the defendant. (*Ibid*.)

Applying the first *Carpenter* test, we observe that defendant's fiancée conveyed two items of extraneous information to Juror No. 7: (1) the prosecution made defendant seem worse than he really was, and (2) Juror No. 7 should keep an open mind. The first item, rather than being prejudicial to defendant, was instead favorable to him. The second item conveyed identical information to that in the trial court's instructions to the jury. We thus conclude, under the first test, that the extraneous information was not so prejudicial that it was inherently and substantially likely to have influenced a juror. (*Carpenter*, *supra*, 9 Cal.4th at p. 653.)

Applying the second *Carpenter* test, we examine the circumstances to determine the likelihood of actual juror bias. (*Carpenter, supra,* 9 Cal.4th at p. 653.) Actual bias means "'the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party.'" (*Nesler, supra,* 16 Cal.4th at p. 581.) Here, Juror No. 7 stated the receipt of the information would not affect her ability to be a fair juror and assess the facts fairly. She confirmed she could put aside the information and could "participate in the jury and fairly deliberate and fairly reach a verdict[.]" The circumstances do not show a substantial likelihood the juror was actually biased against defendant.

Defendant argues, however, that Juror No. 7 disobeyed the trial court's instructions[3] regarding the receipt of extraneous information and that she was not "forthcoming" when she initially failed to tell the court she had been contacted by defendant's fiancée. As the trial court pointed out, its first question—whether the juror had "overheard" a conversation—was indeed ambiguous. We do not assume that Juror No. 7's negative response indicates she was being untruthful. As to Juror No. 7's

---

[3] The trial court instructed the jury before testimony began, "During the trial, do not speak to a defendant, witness, lawyer or anyone else associated with them. Do not listen to anyone that tries to talk to you about the case or about any of the people or subjects involved in it. If someone asks you about the case, tell him or her that you cannot discuss it. If that person keeps talking to you about the case, you must end the conversation. [¶] If you receive any information about this case from any source outside the trial, even unintentionally, do not share that information with any other juror. If you do receive such information or if anyone tries to influence you or any juror, you must immediately tell the deputy."

statement that she just did not think about reporting the contact to the court, we note that the general innocuousness of the information imparted could simply have led the encounter to pass out of the juror's mind. Despite defendant's arguments, we conclude the record does not indicate Juror No. 7 willfully violated the court's instructions or that she had any bias against defendant.

Defendant further contends the trial court failed to make an adequate inquiry to ensure that no prejudice had ensued from the contact.

When a trial court learns of possible juror misconduct, it must undertake an inquiry sufficient to determine if the juror should be discharged and whether the impartiality of other jurors may have been affected. (*People v. Espinoza* (1992) 3 Cal.4th 806, 822.) An evidentiary hearing is required only when evidence is presented demonstrating a strong possibility of prejudicial misconduct, and a hearing is generally unnecessary unless there is a material conflict in the evidence. (*People v. Schmeck* (2005) 37 Cal.4th 240, 295, abrogated on another ground as stated in *People v. McKinnon* (2011) 52 Cal.4th 610, 637.)

Here, the trial court examined Juror No. 7 about what had happened and made a finding that she was credible. She stated she had not told any of the other jurors about the contact. The trial court offered defense counsel the opportunity to submit questions to be asked of her. Defendant argues, however, that the trial court should have inquired of the whole jury panel as to whether anyone else had received information about contacts outside the courtroom. A hearing into potential jury misconduct "should not be used as a 'fishing expedition' to search for possible misconduct . . . ." (*People v.*

*Hedgecock* (1990) 51 Cal.3d 395, 419.) The trial court did not abuse its discretion in declining to make inquiries of the other jurors in the absence of any evidence any other juror had been involved in or informed of the contact between Juror No. 7 and defendant's fiancée.

**E. Sentencing to Middle Term and Imposing Consecutive Sentences**

Defendant contends the trial court abused its discretion in sentencing him to the middle term and to consecutive sentences. Specifically, he argues the trial court failed to specify the reasons for its sentencing choices and failed to impose a sentence that served the interests of justice. He argues, in the alternative, he received ineffective assistance of counsel.

*1. Standard of Review*

We review the trial court's sentencing decisions under the deferential abuse of discretion standard. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.)

*2. Additional Background*

In a sentencing memorandum, defense counsel requested the trial court to impose the low term for the spousal rape and to run defendant's terms for other counts concurrently. At the sentencing hearing, the prosecutor stated he had agreed to recommend the low term. However, the probation report recommended the middle term of six years for the spousal rape and a consecutive term of one year four months for the corporal injury conviction. The probation report identified as aggravating factors that the crime involved great violence (Cal. Rules of Court, rule 4.421(a)(1)), and defendant's violent conduct indicated a danger to society (Cal. Rules of Court, rule 4.421(b)(1)). The

probation report stated there were no mitigating factors. In the sentencing report, defense counsel listed the following mitigating factors: defendant was 29 years old, and his prior convictions had been misdemeanors. The probation report noted that defendant had maintained stable employment for seven years.

In imposing sentence, the trial court stated it had considered "the probation report, [its] own notes on the trial, the sentencing memorandum from the defense, and the oral presentation from the People today." However, the trial court failed to state reasons for its sentencing choices.

*3. Forfeiture*

The People contend defendant has forfeited his challenge to his sentence because he failed to object at the sentencing hearing. (*People v. Scott* (1994) 9 Cal.4th 331, 353 [forfeiture rule applies to "claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices," including the failure "to state any reasons or give a sufficient number of valid reasons"].) We agree that because no objection was raised at the sentencing hearing, the forfeiture rule precludes defendant's claims.

Moreover, defense counsel submitted a sentencing memorandum listing various factors in mitigation and requesting the trial court to impose the low term of three years on count 1 and concurrent terms for the other counts. Defendant argues it is "unclear whether the court properly considered the totality of [defendant's] background and circumstances in refusing to [follow the defense and prosecution's] recommendation" of a low term sentence. However, the trial court explicitly stated it had considered the defense memorandum and the prosecutor's argument. We presume the trial court did

exactly what it said it had done. (Evid. Code, § 664.) A defendant must overcome that presumption by specific evidence, not speculation or supposition. (See, e.g., *Barnett v. Superior Court* (2010) 50 Cal.4th 890, 899-900.)

*4. Assistance of Counsel*

Defendant argues in the alternative that his counsel was ineffective for failing to object at the sentencing hearing.

A single aggravating factor is sufficient to justify imposition of a middle term or consecutive terms on separate convictions. (*People v. Ortiz* (2012) 208 Cal.App.4th 1354, 1371.) Defendant does not dispute the aggravating factors listed in the probation report. Moreover, defendant does not identify any information omitted from the sentencing memorandum his trial counsel provided, and as discussed above, we presume the trial court read and considered that memorandum. Under the circumstances, therefore, it is not reasonably probable a different result would have occurred if counsel had raised objections at the sentencing hearing. (See, e.g., *People v. Coelho* (2001) 89 Cal.App.4th 861, 889-890 [holding that remand for resentencing is not required when it is "virtually certain" the trial court would impose the same sentence on remand].)

**F. Section 654**

Defendant contends the trial court erred in failing to stay his sentence for the corporal injury offense under section 654.

*1. Additional Background*

The probation report stated that it appeared defendant had beaten Doe after becoming angry with her, and counts 1 (spousal battery) and 2 (assault) shared a common

intent and were subject to section 654. The trial court followed that recommendation and stayed the sentence for count 2 under section 654. The probation report stated that the rape occurred after the battery and appeared to have been motivated by a separate intent.

*2. Analysis*

Section 654 precludes multiple punishments for a single act or indivisible course of conduct. (*People v. Hester* (2000) 22 Cal.4th 290, 294.) Whether the defendant had multiple criminal objectives in committing multiple crimes is a question of fact for the trial court, and we uphold the trial court's finding on the issue, whether express or implied, if supported by substantial evidence. (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1135-1136.)

The evidence showed that defendant's objective in beating Doe was to punish her for ending his party too soon. He committed corporal injury against her by choking her and hitting her in the face with his fist. Substantial evidence supports the trial court's implied finding that defendant's objective in raping Doe was sexual gratification. After defendant stopped punching and choking Doe, he moved her to a different part of the kitchen against a counter where he began hugging, kissing, and touching her. He tried to get an erection, and he inserted the tip of his penis in her vagina and anus.

From the sequence of events, the trial court could reasonably find defendant had multiple objectives in committing the two crimes. (See, e.g., *People v. Osband* (1996) 13 Cal.4th 622, 731 [substantial evidence supported the trial court's implied determination that the defendant had multiple objectives of rape and murder in committing his attack on

the victim]; *People v. Hughes* (1969) 268 Cal.App.2d 796, 801.) We conclude section 654 did not require the stay of defendant's sentence for corporal injury.

## IV. DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST
Acting P. J.

We concur:

KING
J.

MILLER
J.